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No. 96-756

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1996

LAURIE ISAAC BROAD, et al.,
for himself and all others who are similarly situated,

*Petitioners,*

*v.*

SEALASKA CORPORATION,
SEALASKA ELDERS' SETTLEMENT TRUST, et al.,

*Respondents,*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# PETITIONERS' REPLY BRIEF

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## PETITIONERS' ARGUMENTS IN REPLY

### I. Although the ANCSA statute applies only in Alaska, the preemption issues are of nation-wide importance.

Sealaska argues that the issues presented here are of only limited importance and cannot arise outside of the Ninth Circuit. Brief in Opposition at pgs. 10-11. Respondent is not correct. This case presents issues that frequently are encountered in federal courts throughout the country: *First*, whether a court should fashion its preemption decisions on the narrowest grounds possible. *Second*, whether a court should find an implied preemption when the federal statute being construed contains an explicit preemption elsewhere in the same text. *Third*, whether a court should resort to a negative pregnant in deciding that the statutory prohibition against one form of discrimination amounts to a statutory authorization for any other form of discrimination.

The importance of the implied preemption issue can be gleaned from considering how frequently it arises in the reported decisions of the courts of appeals. Consider these numbers from a recent search on the Westlaw data base for federal courts of appeals (F.3d only):

**Number of implied preemption decisions reported in the F.3d reporter**

| | |
|---|---|
| January 1996 through October 1996 | 13 |
| August 1993 through October 1996 | 55 |

The importance of preemption doctrine, and preemption's effect on the removal jurisdiction can be seen in the commentaries that have appeared in the academic journals. *See, e.g.*, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORN.L.REV. 767 (1994); Stanley Blumenfeld, *Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim*, 35 UCLA L.REV. 315, 330-40 (1987); Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634 (1984).

## II. The preemption removal was improper.

***(A) The cause of action for an illegal dividend is grounded in state law—the common law of Alaska:***

The common law of Alaska has developed a rule that prohibits a corporation from making a discriminatory dividend, that prohibits a dividend that is not paid on a uniform and pro rata basis to all shares of the same class of stock. *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 277 (Alaska 1981)("the excluded shareholder must participate equally in the payments received by other shareholders"). This is a widely recognized judge-made rule of corporate law. *See, e.g.*, FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd. vol.).

***(1) This is a subject that is completely within the control of state law rules (the federal law actually says so):*** There is no federal law that addresses equality in corporate dividends. Instead, federal law refers us to the controlling state law of corporations. 43 U.S.C. § 1606(h)(1)(A) specifically adopts Alaska law to regulate the affairs of ANCSA corporations:

> Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall —
>
> . . . .
>
> (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

The same explicit deference to state law is found in ANCSA § 39, 43 U.S.C. § 1629e(a)(1)(A) ("in accordance with the laws of the State"). There are four (4) such references to "the laws of the State" in 43 U.S.C. § 1629e. This is the statute upon which Sealaska relies as authority for its corporate discrimination, and is the statute which the Ninth Circuit held "implicitly preempts state law," *Broad v. Sealaska*, 85 F.3d 422, 426 (9th Cir. 1996).

***(2) The Elders' Settlement Trust was established under Alaska law:*** The discriminatory dividend was paid from a trust that Sealaska Corporation established under the authority and control of Alaska law. Alaska Statutes, §§ 13.36.010 - .300 (administration and registration of a trust). This is the only statute that Broad relied upon to state plaintiffs' cause of action (and then only in the amended complaint). Amended Complaint for Class Action, at ¶ 5 (appears in Respondent's Brief in Opposition, Appendix C, pg. 23a).

In its answer, *Sealaska admitted that its trust was established under this Alaska statute*: "Defendants admit the allegations contained in paragraph 5 of the amended complaint, and further state that defendant Sealaska Corporation established the Sealaska Elders' Settlement Trust pursuant to 43 U.S.C. §§ 1629b and 1629e (1987)."

Sealaska's Answer and Affirmative Defenses, at ¶ 5, 13 November 1992, filed at docket # 5.

***(3) So it was Sealaska that first introduced the federal statute, doing so in its answer:*** It first appeared in Sealaska's answer, and also in its notice of removal (appears in Respondent's Appendix B, pg. 13a).

***(B) Sealaska's preemption removal is prohibited by the decisions of this court:***

***(1) Sealaska's removal does not pass the Gully test (a federal question must be obvious on the face of the well-pleaded complaint; plaintiff is master of his cause):*** Justice Cardozo explained that the federal question "must be an element, and an essential one, of the plaintiff's cause of action . . . and . . . must be disclosed *upon the face of the complaint unaided by the answer or by the petition for removal . . . .*" *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936) (emphasis added).

***(2) Sealaska's removal does not pass the Skelly Oil test (a federal question in the defense is not enough to support removal):*** Justice Frankfurter explained that the federal question could not be "injected into the case only in anticipation of a defense" because the underlying contract claim was one that arose under state law. *Skelly Oil Co. v. Phillips, Petroleum Co.*, 339 U.S. 667, 672 (1950). Here, this contract between Sealaska Corporation and its shareholders is governed by Alaska law, that of the state of incorporation. *See also Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2847-48, 77 L.Ed.2d 420, 432 (1983)(same rule, quoting *Gully*).

***(3) Sealaska's removal does not pass the Caterpillar test (only a "complete preemption" is enough to allow removal):*** Justice Brennan explained that there is an "independent corollary" to the well pleaded complaint rule, known as the "complete pre-emption" doctrine. It allows removal only if the preemptive force of a federal statute is so "extraordinary" that it converts a state common-law claim into a federal claim (and thus allows preemption removal). *Caterpillar Tractor v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318, 327 (1987). These situations are rare. *Strong v. Telectronics Pacing Systems, Inc.* 78 F.3d 256, 259 (6th Cir. 1996) (removal was improper because "complete preemption doctrine" applies in only two situations in which Congress has expressed the intent that federal law completely displaces state law: in § 301 of the Labor Management Relations Act and in § 502 of ERISA).

## CONCLUSION

This Petition for Certiorari should be granted *or* in the alternative, the Ninth Circuit's decision should be vacated with instructions for dismissal in federal court accompanied by remand to the courts of the State of Alaska. Supreme Court Rule 16.1.

Respectfully submitted this 4th day of January in 1997 at Petersburg, Alaska.

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